January 22, 2004

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW – Room TW-A325
Washington, D.C. 20554

Filed via Electronic Filing

Re: *Ex Parte* Presentation in the Proceeding Entitled "Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process" – WT Docket No. 03-128

Dear Ms. Dortch:

On Wednesday, January 21, 2004, the following individuals, representing the companies or associations indicated, met with officials of the Commission:

Ben Almond	Cingular
David Jatlow	AT&T Wireless Services, Inc
Anthony Lehv	American Tower Corporation
Harold Salters	T-Mobile USA
Roger Sherman	Sprint Corporation
John Clark –	Perkins Coie LLP – Counsel to the Wireless Coalition to Reform Section 106

The Commission officials attending the presentation were as follows:

Sheryl Wilkerson	Office of Chairman Michael Powell
Jeffrey Steinberg	Wireless Telecommunications Bureau ("WTB")

At this presentation, the Commission officials discussed the schedule for the order that will adopt the Nationwide Programmatic Agreement ("NPA") that is the subject of this proceeding, and the procedures that will be used to allow the Advisory Council on Historic Preservation ("ACHP") and the National Conference of State Historic Preservation Officers ("NCSHPO") to review and sign the final agreement.

The representatives from industry discussed the fact that House Resources Committee Chairman Richard Pombo and National Parks Subcommittee Chairman George Radanovich recently sent a letter (the "Pombo/Radanovich letter") to John Nau, Chairman of the ACHP, with a copy to Chairman Michael Powell, expressing concern that ACHP's rules extended coverage of Section 106 to properties "only 'potentially eligible' for the National Register of Historic Places," and this change in federal law has "particularly burdened" the wireless telecommunications industry. "

The industry representatives stated that ACHP and NCSHPO have signaled that they are interested in incorporating provisions in the NPA to address the potential eligibility problem outlined in the Pombo/Radanovich letter. The industry representatives also told the Commission officials that they are asking the Commission to delay adoption of the NPA one month to allow ACHP, the NCSHPO and industry to develop provisions for the NPA to do so.

Industry representatives offered to assist the Commission in any reasonable way to understand and address concerns that Indian tribes may have with any proposed resolution of the potential eligibility problem in the NPA.

The undersigned submitted the document attached hereto as Attachment 1 to Ms. Wilkerson via email after the presentation.

Respectfully submitted,

John F. Clark
Counsel to the Wireless Coalition to Reform Section 106

JFC:jfc

Attachment 1

-----Original Message-----

From: Clark, John F. - WDC

Sent: Wednesday, January 21, 2004 7:45 PM

To: 'Sheryl.Wilkerson@fcc.gov'

Cc: Jeffery Steinberg (E-mail); Ben G. Almond (E-mail); Andrea D. Williams (E-mail); Andy Lachance (E-mail); Chris Parandian (E-mail); David Jatlow (E-mail); H. Anthony Lehv (E-mail); Harold Salters (E-mail); Jay Keithley (E-mail); Roger Sherman (E-mail); Tony Russo (E-mail)

Subject: NPA Adoption Schedule

Sheryl:

Per our discussion earlier today, I have attached two documents that may be of interest.

The attached word document is an *ex parte* letter from a meeting over four weeks ago on December 10 where industry raised with WTB the issues from the Pombo letter.

Also, below is an email from last Friday from the ACHP. This went to numerous individuals in the TWG. Towards the bottom it expresses interest in incorporating a resolution of the potentially eligible property issue in the NPA before release.

As I mentioned to you in a voicemail this evening, John Fowler today expressed to WTB the ACHP's willingness to see the NPA delayed one month. John Fowler has also said he would call you directly tomorrow after the meeting of the ACHP Telecom Issues Committee on this subject.

Thanks again for your time today.

Regards,

John

> -----Original Message-----

> From: charlene vaughn [mailto:cvaughn@achp.gov]

> Sent: Friday, January 16, 2004 6:04 PM

> To: Bambi Kraus; Aliza Katz; Allyson Brooks; Amos Loveday; Andrea

> Williams; Andy Lachance; Ann Bobeck; Anne Swanson; Autumn Rierson;

Bill

> Tortoriello; Carla Conover; Chris Gacek; Dan Abeyta; Dan Menser;

Deborah

> Behlin; Ed Roach; Elizabeth Merritt; Frank Stillwell; Geoffrey

> Blackwell; Glenn S. Rabin; James Garrison; James Goldstein; Jeffrey

> Steinberg; Jim Swartz; Jimmy Vaughan; John Clark; Laura Roecklein;

Lina

> Tonkunas; Louie Wynne; Mercedes Aramburo; Michael Wagner; Nancy Miller

> Schamu; Sherman, Roger C [CC]; Sheila Burns; Sheldon Moss; Susan

> Steiman; Kincaid, Thomas [NTK]; Jo Reese; asmith@crai-ky.com; nellie

> longsworth; Nina Shafran; DIMEDIME; Andrea Bruns; jprevite; dbrown;

> Anthony.Lehv; Sheldon Moss; Sheila Burns; Rebecca DeMoss; nellie

> longsworth; Mercedes Aramburo; Louie Wynne; John Clark; Jo Reese;

James

> Garrison; James Goldstein; Heather Weaver; Elizabeth Merritt;

DIMEDIME;

> Deborah Behlin; davidsr01@mindspring.com; Dan Abeyta; Bill

Tortoriello;

> Bambi Kraus; Anne Swanson; Andy Lachance; Andrea Bruns; Aliza Katz;

> asmith@crai-ky.com

> Subject: TWG meeting scheduled for January 29th

>

> Dear TWG Members:

>

> It has been quite a while since we last met to discuss the drafting of

a

> Nationwide Programmatic Agreement (PA) for telecommunications

activities

> under the jurisdiction of the Federal Communications Commission (FCC).

> When we last met in the Spring of 2003, it was agreed that the ACHP_s

> Telecommunications Working Group should hold one last meeting when

> comments were received and reviewed by FCC in response to its Notice

of

> Proposed Rulemaking published on June 9, 2003. Further, it was agreed

> that the TWG Members should be briefed regarding any proposed changes

to

> the draft PA resulting from consultation among the FCC, the National

> Conference of State Historic Preservation Officers (NCSHPO), and the

> ACHP.

>

> The FCC has advised us that it intends to present a final PA to its

> Commission in late February. It, therefore, would be useful for the

TWG

> to meet as soon as possible so that we can share with FCC the views of

> this group. Accordingly, we have made arrangements to meet on January

> 29th in Washington, DC.

>

> Roger Sherman has graciously agreed to host this meeting at the Sprint

> Corporation_s headquarters. The details regarding the meeting are as

> follows:

>

> Date: Thursday, January 29, 2004

> Time: 1:00 to 4:00 P.M.

> Location: 401 9th Street, NW, 4th Floor

> Washington, DC

> Metro Access: Green/Yellow Line (Navy Memorial/Archives Station)

> Red Line (Gallery Place)

> Teleconference: Yes (Please advise of your need for access by cob

> January 27th)

> RSVP: Charlene Vaughn at cvaughn@achp.gov or 202-606-8533

>

> Since FCC, NCSHPO, and the ACHP are still discussing possible

revisions

> to the draft PA, we do not presently have a copy of a revised draft PA

> to share with you. Nonetheless, we will make every effort to forward a

> copy of the revised draft PA to you prior to the meeting so that we

can

> have a productive discussion regarding any proposed changes to the

> stipulations or the process currently set forth in the draft PA.

>

> Please note that as part of this meeting, TWG members will have an

> opportunity to explore options to resolve the concerns raised Chairman

> Richard Pombo (CA) and Congressman George Radanovich (CA) of the House

> Committee on Resources in their letter of November 26, 2003, to John

L.

> Nau, III, Chairman of the ACHP. The letter expresses concerns

regarding

> the applicability of the ACHP_s regulations to properties that are

> _potentially eligible_ for listing in the National Register of

Historic

> Places, and the impact this has on the siting of cellular towers. If

> possible, the Committee would like this matter addressed in a

practical

> manner during negotiations to finalize the FCC Nationwide PA.

>

> Should you have any questions regarding this meeting, feel free to

> contact me. Also, if you believe that I have failed to contact any of

> the TWG members with this e-mail, please forward it on my behalf.

>

> I hope that you can attend as we are at a critical juncture in

> attempting to finalize a process that balances the needs of the

> telecommunications program with the requirements of Section 106 of the

> National Historic Preservation Act. I hope to see you soon.

>

> Regards,

> Charlene Dwin Vaughn

> Assistant Director, Federal Program Development

> Advisory Council on Historic Preservation

> 1100 Pennsylvania Avenue, NW, Room 803

> Washington, DC 20004

December 12, 2003

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW – Room TW-A325
Washington, D.C. 20554

Filed via Electronic Filing

Re: *Ex Parte* Presentation in the Proceeding Entitled "Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process" – WT Docket No. 03-128

Dear Ms. Dortch:

On Thursday, December 11, 2003, the following individuals, representing the companies or associations indicated, met with officials of the Commission:

James Goldstein -	Nextel Communications, Inc.
David Jatlow –	AT&T Wireless Services, Inc.
Jay Keithley -	PCIA – The Wireless Infrastructure Association
Andre J. Lachance -	Verizon Wireless
H. Anthony Lehv –	American Tower Corporation
Tony Russo –	T-Mobile USA, Inc.
Roger Sherman -	Sprint Corporation
Andrea Williams -	The Cellular Telecommunications and Internet Association ("CTIA")
John Clark –	Perkins Coie LLP

The Commission officials attending the presentation were as follows:

John Branscome -	Wireless Telecommunications Bureau ("WTB")
Aliza Katz	Office of General Counsel ("OGC")
Amos Loveday	WTB
Jeffrey Steinberg	WTB
Frank Stilwell	WTB
Gerald Vaughan	WTB

At this presentation, the representatives from industry discussed the fact that House Resources Committee Chairman Richard Pombo and National Parks Subcommittee Chairman George Radanovich recently sent a letter (the "Pombo/Radanovich letter") to John Nau, Chairman of the Advisory Council on Historic Preservation ("ACHP") with a copy to Chairman Michael Powell, expressing concern about the ACHP's interpretation of Section 106 of the National Historic Preservation Act ("NHPA").

In the letter, the Chairmen described their concern that ACHP's rules extended coverage of Section 106 to properties "only 'potentially eligible' for the National Register of Historic Places," and this change in federal law has "particularly burdened" the wireless telecommunications industry. The Chairmen also asked the ACHP to "consider addressing and correcting this problem in the Council's current rulemaking, and/or in the programmatic agreement negotiations with the Federal Communications Commission and the National Conference of State Historic Preservation Officers (NCSHPO)."

At the meeting, the industry representatives asked the Commission representatives what impact the Pombo/Radanovich letter might have on the development of the Nationwide Programmatic Agreement ("NPA") that is the subject of this proceeding. The industry representatives also restated the positions that they had each expressed in the comments filed in this proceeding. The Commission representatives stated that they were not aware what effect, if any, the Pombo/Radanovich letter might have, but to be successful at this late stage of the proceeding, they felt that any changes relating to that issue would probably have to be proposed by the ACHP and/or the NCSHPO.

Industry representatives presented to the Commission representatives a copy of the comments that PCIA submitted to the ACHP in response to the Notice of Proposed Rulemaking released by the ACHP in the currently open proceeding entitled "Protection of Historic Properties Notice of Proposed Rulemaking, RIN 3014-AA27." A copy of the comments presented is attached as Attachment 1.

Respectfully submitted,

John F. Clark
Perkins Coie LLP
Counsel to: American Tower Corporation
AT&T Wireless Services, Inc.
PCIA – The Wireless Infrastructure Association
T-Mobile USA. Inc.

JFC:jfc

Attachment 1

Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, DC 20554

In the Matter of	)	
NATIONWIDE PROGRAMMATIC	)	
AGREEMENT REGARDING THE	)	WT Docket No. 03-128
SECTION 106 NATIONAL HISTORIC	)	
PRESERVATION ACT REVIEW PROCESS	)	

To: The Commission

COMMENTS OF PCIA – THE WIRELESS INFRASTRUCTURE ASSOCIATION

Jay Kitchen
President and CEO
Julie Coons
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Dated August 8, 2003 (202) 434-1637

CONTENTS

Summary

On behalf of its members, PCIA – The Wireless Infrastructure Association – presents these comments in general support of the Draft Nationwide Programmatic Agreement ("Draft NPA") regarding Section 106 reviews of FCC Undertakings under the National Historic Preservation Act ("NHPA"). Although the Draft NPA achieves many of the streamlining goals set by the Telecommunications Working Group ("TWG"), the group responsible for the initial draft, PCIA cautions that the FCC's Draft NPA has veered from those goals in several crucial ways. Indeed, PCIA is concerned that, without careful correction, some of the changes to the Draft NPA could lead to a final agreement that complicates rather than streamlines the Section 106 process.

In these comments, PCIA identifies several key principles that should guide the Commission in finalizing the Draft NPA.

- The final NPA must streamline and clarify the Section 106 process;
- The final NPA should streamline tribal participation provisions;
- Many activities at tower sites are not Undertakings and therefore, are not subject to Section 106 review;
- Exclusions must be practicable;
- Consideration of visual effects must be defined, explained and limited, as provided in current law; and
- Section 106 applies only to listed and determined eligible properties.

PCIA is confident that these guidelines will result in an NPA that will continue to preserve historic properties while bringing invaluable efficiency and economy to the Section 106 review process.

In addition, PCIA suggests a number of specific changes to the Draft NPA that can improve the Section 106 process and more precisely tailor its requirements to the Commission's responsibilities and the commercial and regulatory realities of the telecommunications industry. These solutions implement the guiding principles, which PCIA views as critical to the success of the Draft NPA in streamlining the Section 106 process.

Finally, PCIA provides revised versions of the Draft NPA and the two Submission Packet forms (Forms NT and CO) with suggested provisions intended to correct and improve the documents, as well as implement PCIA's proposals.

Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, DC 20554

In the Matter of NATIONWIDE PROGRAMMATIC AGREEMENT REGARDING THE SECTION 106 NATIONAL HISTORIC PRESERVATION ACT REVIEW PROCESS	)))))	WT Docket No. 03-128

To: The Commission

COMMENTS OF PCIA – THE WIRELESS INFRASTRUCTURE ASSOCIATION

Introduction and Background

PCIA – The Wireless Infrastructure Association – submits these comments on behalf of its members in response to the Federal Communications Commission's ("FCC" or "Commission") Notice of Proposed Rulemaking ("*NHPA Notice*") regarding the Nationwide Programmatic Agreement ("Draft NPA") for the Section 106 National Historic Preservation Review Process.[1]

PCIA is the principal trade association representing the wireless telecommunications and broadcast infrastructure industry. PCIA's members own and manage telecommunications towers and antenna facilities, and own or manage more than 50,000 towers that support digital and broadband services across the country. In the

[1] *See* Notice of Proposed Rulemaking, *Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process*, WT Docket No. 03-128, FCC 03-125 (rel. June 9, 2003) ("*NHPA Notice*").

digital wireless age, towers are the indispensable infrastructure supporting the wireless networks on which much of our country's economy, public safety, and national security depend.

As the leading representative of infrastructure providers, PCIA monitors the regulatory obligations imposed on its members and others in the industry. In addition, PCIA's members interact daily with State Historic Preservation Officers ("SHPOs"), Indian tribes and other consulting parties to implement the Section 106 process. These experiences provide PCIA's members with a unique perspective and a keen understanding of how this process works in practice, what changes are needed, and what will and will not improve or streamline the process.

No stakeholder in the streamlining process has invested more in this proposed programmatic agreement, is more sympathetic to its goals, or is more hopeful for its success than is PCIA. For three years, PCIA worked in the Telecommunications Working Group ("TWG") with the Commission, and with many other groups in the development of the nationwide agreements that are the subject of the *NHPA Notice*.[2]

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[2] *See Public Notice*, "Wireless Telecommunications Bureau and Mass Media Bureau Invite Indian Tribes, Alaskan Native Villages and Native Hawaiian Organizations to Participate in Developing State Prototype Programmatic Agreement Regarding Historic Properties, Listed or Eligible for Listing in the National Register of Historic Places," DA 02-312 (rel. June 11, 2002).

The TWG was originally formed by the Advisory Council on Historic Preservation ("ACHP") in August of 2000 and was made up of, or had input from, the following groups: (1) representatives from government, including the FCC, the ACHP, the National Conference of State Historic Preservation Officers ("NCSHPO"), and individual State Historic Preservation Officers ("SHPOs") notably those from Delaware, Ohio, Vermont, Arkansas, Arizona, Massachusetts, Georgia, Washington, and North Carolina; (2) tribal representatives, including the National Association of Tribal Historic Preservation Officers ("NATHPO") the National Council of American Indians, United South and Eastern Tribes ("USET"), and representatives from individual tribes, including the Navajo Nation and others; (3) the wireless telecommunications, telecommunications infrastructure and broadcast industries, including representatives from the trade associations Cellular Telecommunications and Internet Association ("CTIA"), PCIA, and the National Association of Broadcasters ("NAB"), and individual companies including Nextel, AT&T Wireless, Verizon Wireless, Sprint PCS, American Tower Corporation, Crown Castle, SBA, T. Mobile, and Alltel; (4)

PCIA played a key role in the drafting of the Nationwide Collocation Programmatic Agreement ("Collocation Agreement" or "NCPA")[3] and PCIA helped draft much of what has now become the Draft NPA.

It is, therefore, from a position of support, and with the wisdom of its long experience, that PCIA must caution the Commission that this Draft NPA has veered in some crucial ways from its original course and from the streamlining goals adopted by the Commission. PCIA is concerned that without careful correction, some of the proposed changes to the Draft NPA could lead to a final NPA that complicates, rather than streamlines the Section 106 process. Some of these changes could add considerable unnecessary burden and expense to the already costly and time-consuming process that PCIA's members and others FCC regulatees must undertake on behalf of the Commission. PCIA urges the Commission to avoid that unfortunate and unnecessary regulatory result.

PCIA reaffirms its belief that adoption of this agreement remains an important goal. PCIA's members have long been frustrated by the "regulatory muddle and delay that has beset . . . tower-construc[tion]" described by Chairman Powell.[4] PCIA agrees with the Chairman that the NPA must "improve our ability to protect valuable historic and environmental resources, while at the same time accelerating the process of deploying necessary communications infrastructure."[5] It is important to note that PCIA's members are some of the key field participants that must effectuate the

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National Historic Trust; and (5) representatives of the cultural resources consulting industry, including the trade association American Cultural Resources Association ("ACRA") and individual companies such as EBI and URS Dames and Moore.

[3] *NHPA Notice* at Attachment 1.

[4] *Id.*, Separate Statement of Chairman Michael K. Powell.

[5] *Id.*

Commission's policies and both elements of this laudable goal. As such, PCIA believes that its members' hands-on experience and perspective should lend particular weight to these comments.

In these comments, PCIA identifies several of the principles that guided the deliberations of the TWG and which should continue to guide the Commission in finalizing the NPA. PCIA also suggests a number of specific changes that can improve the Section 106 process and more precisely tailor its requirements to the Commission's responsibilities and the commercial and regulatory realities of the telecommunications industry. Finally, PCIA provides a revised version of the Draft NPA (Attachment A) and the two Submission Packet forms (Attachments B and C) with suggested modifications intended to correct and improve the documents as well as implement PCIA's proposals.

As discussed herein, PCIA urges the Commission to adopt the guiding principles and concepts developed by the TWG, to establish new principles that advance those same goals, and to correct and clarify certain portions of the Draft NPA that are inconsistent with current preservation law. PCIA believes that it will be important for the Commission to preserve only the portions of the Draft NPA that adhere to these principles and to incorporate only those revisions that do the same. PCIA is confident that these guidelines will result in a final NPA that will continue to preserve historic properties while bringing invaluable efficiency and economy to the Section 106 review process.

I. Key Principles That Should Guide the Finalization of the NPA

The TWG crafted much of the Draft NPA over more than a year, involving hundreds of person-hours of serious debate and compromise. This important work was guided by an unwritten set of principles and goals. The Commission's Section 106 policy should continue to seek to achieve these core principles and to harmonize the

remaining portions of the Draft NPA with prevailing law and the NHPA. Accordingly, PCIA urges the Commission to adopt and apply the following tenets in finalizing the Draft NPA and in evaluating the comments and suggestions of parties in this proceeding:

- The NPA must streamline and clarify the Section 106 process;
- The NPA should streamline tribal participation provisions;
- Many activities at tower sites are not Undertakings and therefore, are not subject to Section 106 review;
- Exclusions must be workable;
- Consideration of visual effects must be defined, explained and limited as provided in current law; and
- Section 106 applies only to listed and determined eligible properties.

A. Streamlining and Clarifying Section 106 Procedures

After many years of effort and public input, the Advisory Council on Historic Preservation ("ACHP" or "Council") developed a detailed set of procedures and rules to implement Section 106 for all federal agencies.[6] By law, any National Historic Preservation Act ("NHPA") programmatic agreement must be consistent with the ACHP's regulations and prevailing law.[7] To meet the Commission's streamlining goals, however, the Draft NPA must also clarify, simplify, focus and tailor the process to meet the realities of the telecommunications industry and the Commission's regulatory responsibilities. Where possible, the new NPA should provide the same level of protection to historic properties as the ACHP rules, while also employing

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[6] *See* 36 C.F.R. Part 800.

[7] *See id.* § 800.14(a).

greater flexibility and incurring less cost and delay. The Commission's streamlining efforts should improve existing processes without imposing additional requirements upon regulators, applicants or licensees.

PCIA approves and supports the adoption of a number of specific proposals set forth in the Draft NPA provisions. These proposals advance the key principles identified above.

First, PCIA agrees that all replacement towers should be excluded from the consultation and review process. Allowing tower owners to extend the existing compound and excavation by "30 feet in any direction" appropriately provides a reasonable and realistic degree of flexibility.[8]

Second, in the section of the Draft NPA concerning the assessment of effects, the proposed text stipulates that "[n]o archeological survey shall be required if the Undertaking is unlikely to cause direct effects to archeological sites."[9] PCIA strongly supports this language and believes this exclusion is a worthy example of a practical and low-risk streamlining measure.

Third, PCIA supports the adoption of the presumption that no archeological resources exist within an area of potential effect ("APE") where all areas to be excavated involve "previously disturbed" ground to the specified depths. PCIA also approves of the exception for the footings and similar limited areas of deep excavation." Because construction of towers and collocation antennas and associated equipment typically involves only limited deeper excavation, this definition poses little risk to archeological resources. Moreover, this exclusion would be impractical and unusable

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[8] Draft NPA at Section III.A.2., A-8.

[9] *Id.* at Section VI.C.3., A-18.

without this footing exemption. Again, PCIA commends this recognition of the realities of the telecommunications industry and supports inclusion of this provision. Fourth, the Commission should continue and improve upon the efforts of the TWG in developing standard, understandable and user-friendly submission packets for Section 106 reviews. PCIA does not believe, however, that the proposed draft forms yet achieve this streamlining goal. PCIA accordingly suggests significant revisions to the submission packet forms (Form NT and Form CO) as shown in Attachments B and C. Finally, bringing uniformly applied and fairly enforced time limits to the historic preservation review process is extremely important to PCIA. The time limits in the final NPA should streamline the process, properly speed conclusion of Section 106 review, and require action within specific, reasonable review and comment periods. Prolonged review of proposed facilities wastes valuable and limited compliance resources and injects debilitating uncertainty into the progress of the deployment of networks. As such, PCIA strongly supports the proposal in the Draft NPA that if the SHPO fails to respond to an Applicant's Submission Packet within thirty days, the proposed facility will be deemed to have "no effect on [h]istoric [p]roperties," and the Section 106 review will be complete. This thirty-day period provides SHPOs adequate time to review proposed facilities and generates the proper incentives for SHPOs to conduct Section 106 reviews efficiently.[10]

B. Scope and Nature of Tribal Participation

In every facet of the Section 106 process, Indian tribes must be treated with the utmost respect that they deserve as domestic dependent sovereign nations. This is true both in their relations with the federal and state governments and with private

[10] PCIA addresses improvements to other timing issues related to the Section 106 process elsewhere throughout these comments.

industry. Tribes are entitled to special consideration in certain areas, particularly in their right to government-to-government consultation,[11] the effort needed to identify potentially interested tribes,[12] and in the effort needed to identify historic properties to which a tribe may attach religious and cultural significance.[13] Notwithstanding these special considerations, in other areas, the Draft NPA need not and should not confer greater rights on tribes than those imposed on other Section 106 consulting parties. To the extent that the Navajo Nation and the United South and Eastern Tribes ("USET") have proposed greater rights for tribes, these proposals should be rejected.

1. The Navajo Nation Proposal

The Draft NPA includes in Section III.B. a proposal by the Navajo Nation that would require applicants to notify Indian tribes prior to commencement of construction of every Undertaking otherwise excluded from the Section 106 process under the NPA except temporary structures. In support of this position, the Navajo Nation argues that Indian tribes have special rights of consultation under the NHPA that may not be excluded in a programmatic agreement, and that because they have not been consulted heretofore by industry or the FCC in connection with many completed towers, they should not have their rights of notification or consultation further limited in this agreement.

There are three fundamental flaws in the Navajo Nation's proposal. First, under the ACHP rules, the legal effect of excluding classes of Undertakings is an unqualified exemption from Section 106 review. The ACHP rules do not contemplate or allow exemptions to categories of exclusion, except when the Commission determines

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[11] *See* 36 C.F.R. § 800.14(f).

[12] *See id.* § 800.3(f)(2).

[13] *See id*. § 800.4(b).

special circumstances warrant review.[14] PCIA believes that any attempt to force such an awkward process into the NPA would be ill-advised. Second, tribes have no independent right to consultation outside the context of the Section 106 process. And, third, no legally sustainable reason has been advanced to justify this unnecessary and burdensome proposal. For these reasons, PCIA encourages the Commission to reject the Navajo Nation's proposed language and adopt the alternative Section III.A. proposes in the Draft NPA.

a. The Legal Effect of Excluding Classes of Undertakings as an Unqualified Exemption From Section 106 Review

Under Section 214 of the NHPA and ACHP Rule 800.14, the FCC is authorized to develop alternate procedures,[15] including programmatic agreements,[16] as a complete substitute for the Council's Section 106 rules.[17] The Commission's authority to exclude certain Undertakings from Section 106 review[18] is rooted in section 214 of

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[14] *See id.* § 800.14(e).

[15] Section 800.14(a) provides that "[a]n agency official may develop procedures to implement section 106 and substitute them for all or part of subpart B of this part if they are consistent with the Council's regulations pursuant to section 110(a)(2)(E)." 36 C.F.R. § 800.14(a).

[16] Subsection b states that "[t]he Council and the agency official may negotiate a programmatic agreement to govern the implementation of a particular program or the resolution of adverse effects from certain complex project situations or multiple undertakings." *Id.* § 800.14(b).

[17] *See id.* § 800.14(b)(2)(iii) ("Compliance with the procedures established by an approved programmatic agreement satisfies the agency's section 106 responsibilities for all individual undertakings of the program covered by the agreement until it expires or is terminated by the agency, the president of NCSHPO when a signatory, or the Council.").

[18] The Council's regulations make clear that excluded Undertakings are exempted from any and all consultation and review under Section 106. ACHP Rule 800.14(c)(6) specifies:

> Any undertaking that falls within an approved exempted program or category shall require no further review pursuant to [the Council's Regulations in] subpart B of this part, unless the

the NHPA, which grants the Council broad authority to "promulgate regulations, as appropriate, under which Federal programs or Undertakings may be exempted from any or all of the requirements of [the NHPA]."[19] Consistent with this authority, the Draft NPA states that "this Nationwide Agreement will, upon its execution by the Council, the Conference, and the Commission, constitute a substitute for the Council's rules with respect to certain Commission Undertakings."[20] Accordingly, the legal effect of excluding classes of Undertakings is an unqualified exemption from Section 106 review.

The rules neither allow for nor contemplate any exception to the exclusion for particular classes of consulting parties.[21] Obviously any such exception would not only be extremely awkward, but would also defeat much of the benefit for which the exclusions are developed in the first place, ultimately defeating the goals of the NPA.

> agency official or the Council determines that there are circumstances under which the normally excluded undertaking should be reviewed under subpart B of this part.

Id. § 800.14(c)(6) (emphasis added).

[19] NHPA Section 214 provides in full

> The Council, with the concurrence of the Secretary, shall promulgate regulations or guidelines, as appropriate, under which Federal programs or undertakings may be exempted from any or all of the requirements of this Act when such exemption is determined to be consistent with the purposes of this Act, taking into consideration the magnitude of the exempted undertaking or program and the likelihood of impairment of historic properties.

16 U.S.C. § 470v.

[20] Draft NPA at A-2.

[21] The provisions of 36 C.F.R. § 800.14(c) allow for exception to exclusions in "circumstances" involving an undertaking, not for classes of consulting parties.

b. Indian Tribes Have No Independent Right to Consultation Outside the Section 106 Process

Upon execution, the final NPA will constitute a complete substitute for the Section 106 process, including an applicant's tribal consultation obligations.[22] Despite the Navajo Nation's claims that Section 101(d)(6) of the NHPA imposes separate consultation obligations, no independent right to consult exists outside the Section 106 process**.**

Section 101(d)(6) of the NHPA provides, in relevant part:

> (A) Properties of traditional religious and cultural importance to an Indian Tribe or Native Hawaiian organization may be determined to be eligible for inclusion on the National Register.
>
> (B) In carrying out its responsibilities under section 106 of the Act, a Federal agency shall consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to properties described in subparagraph (A). * * *[23]

The consultation obligation in Section 101(d)(6)(B), however, extends no further than the Section 106 process, as the phrase "[i]n carrying out its responsibilities under section 106 of the Act" makes clear. Where Section 106 responsibilities are lawfully excluded and require no further review, there is clearly nothing left of the consultation requirement provided in Section 101(d)(6). Moreover, the numerous references and explanations regarding tribal consultation in the Council's rules implementing both Section 101(d)(6) and Section 106 firmly establish that the Commission's tribal

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[22] *See* 36 C.F.R. § 800.14(b)(iii).

[23] 16 U.S.C. §470a(d)(6).

consultation obligations are based on Section 106 and extend no further than the Section 106 process.[24]

No other federal laws contain any independent tribal consultation requirements in connection with effects to historic properties or for Undertakings excluded from consultation and further review under the Draft NPA or the NCPA. Neither the American Indian Religious Freedom Act,[25] the Native American Graves Protection and Repatriation Act,[26] nor the Archeological Resources Protection Act[27] provide any justification for the Navajo Nation's position.

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[24] *See, e.g.*, 36 C.F.R. § 800.2(c)(2)(ii)(A) ("The agency official shall ensure that consultation in the section 106 process provides the Indian tribe or Native Hawaiian organization a reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties, including those of traditional religious and cultural importance, articulate its views on the undertaking's effects on such properties, and participate in the resolution of adverse effects. It is the responsibility of the agency official to make a reasonable and good faith effort to identify Indian tribes and Native Hawaiian organizations that shall be consulted in the section 106 process."); *id.* § 800.2(c)(2)(ii)(D) ("When Indian tribes and Native Hawaiian organizations attach religious and cultural significance to historic properties off tribal lands, section 101(d)(6)(B) of the act requires Federal agencies to consult with such Indian tribes and Native Hawaiian organizations in the section 106 process. Federal agencies should be aware that frequently historic properties of religious and cultural significance are located on ancestral, aboriginal, or ceded lands of Indian tribes and Native Hawaiian organizations and should consider that when complying with the procedures in this part."); *id.* § 800.3(f) ("Identify other consulting parties. In consultation with the SHPO/THPO, the agency official shall identify any other parties entitled to be consulting parties and invite them to participate in the section 106 process."); *id.* § 800.3(f)(2) ("Involving Indian tribes and Native Hawaiian organizations. The agency official shall make a reasonable good faith effort to identify any Indian tribes or Native Hawaiian organizations that might attach religious and cultural significance to historic properties in the area of potential effects and invite them to be consulting parties. Such Indian tribe or Native Hawaiian organization that requests in writing to be a consulting party shall be one.").

[25] 42 U.S.C. § 1996.

26 25 U.S.C. §§ 3001-13.

[27] 16 U.S.C. §§ 470aa-70mm.

In addition, Section 101(d)(6) expressly limits the description of properties to which the consultation duty extends to only those properties determined eligible for the National Register.[28]

c. The Navajo Nation Has Failed to Adequately Justify This Unnecessary and Burdensome Proposal

The Navajo Nation has been unable to articulate a sufficient justification for why the carefully crafted exclusions should not apply to tribes or why these excluded projects would have higher potential for effects on historic properties of significance to tribes than to other historic properties. The proposal creates an awkward "exceptions-to-the-exclusions" provision, thereby obviating much of the benefit to be gained from adopting exclusions in the first place. The proposal would result in unnecessary delay and expense as applicants would be required to submit thousands of notifications for Undertakings unlikely to cause effects to Indian historic properties.

The ACHP's regulations do provide that an "exempted program or category *shall require no further review*," unless the agency official "determined that there are circumstances under which *the normally excluded undertaking* should be review under subpart B of this part."[29] Such kick-out provisions are common in environmental law. They are used to address exceptional circumstances in the individual case that indicate that application of the exclusion is inappropriate.[30] Use

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[28] *Id.* § 470a(d)(6)(A), (B); *see* discussion *infra* Section I.F.

[29] 36 C.F.R. § 800.14(c)(6) (emphasis supplied).

[30] *See, e.g.*, 40 C.F.R. § 1508.4. This provision of the National Environmental Policy Act regulations defines activities categorically excluded from further environmental review, which is akin to the exclusions listed in the Section III.A. of the Draft NPA. The provision provides,

> "Categorical exclusion" means a category of actions which do not individually or cumulatively have a significant effect on the human

of a kick-out provision is appropriate when the agency determines that a particular excluded activity will produce significant effects of the sort the act was designed to address.[31]

Given the significant burden and complication its proposal would add to the Section 106 process, convincing justification for the special notification the Navajo Nation is requesting should be required. It has provided none. The Navajo Nation has made no attempt to justify what must be its implicit claim that impacts on historical properties from actions that the FCC has otherwise deemed likely to be minimal or not adverse in all other cases somehow generates more acute impacts on certain lands of cultural or religious importance to tribes thereby warranting consultation. Moreover, the Navajo Nation unreasonably proposes that it will be the Indian tribe that shall determine, after notification, whether an adverse effect may occur and whether further review is necessary. The ACHP's regulations clearly state that it is the agency or the ACHP that is responsible for determining whether its is appropriate to use a kick-out provision, not interested parties.[32]

> environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations (Sec. 1507.3) and for which, therefore, neither an environmental assessment nor an environmental impact statement is required. An agency may decide in its procedures or otherwise, to prepare environmental assessments for the reasons stated in Sec. 1508.9 even though it is not required to do so. Any procedures under this section shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect.

Id. § 1508.4 (emphasis supplied).

[31] *See id.*

[32] *See* 36 C.F.R. § 800.14(c)(6) ("Any undertaking that falls within an approved exempted program or category shall require no further review . . . unless the agency official or the Council determines that there are circumstances under which the normally excluded undertaking should be reviewed under subpart B of this part."). (Emphasis added).

The TWG developed the proposed exclusions in Section III.A. precisely because they have little or no ability to cause adverse effects to historic properties, including properties of significance to Indian tribes or native Hawaiian organizations ("NHOs").[33] In contrast to the Navajo Nation's unwieldy proposal, straight application of those exclusions, with of course attention to extraordinary individual cases requiring review, achieves the purposes of the NPA. For these reasons, PCIA encourages the Commission to reject the Navajo Nation's proposed language.

2. The USET Proposals

USET has proposed an alternative – Alternative B – to Section IV. of the Draft NPA.[34] Among other things, Alternative B would require the Commission to consult directly with every tribe, for every Undertaking, except where a given tribe expressly waives in writing its right to direct consultation. USET argues that Alternative A constitutes an unlawful delegation to non-governmental entities of the Commission's obligations under both Section 101(d)(6) and the federal trust responsibility to consult with tribes. USET offers Alternative B as a "practical solution" to this asserted problem.[35]

PCIA believes that Alternative B, far from being a practical solution, would be a logistical and regulatory nightmare for all parties involved, including Indian tribes. More importantly, the heavy-handed, inflexible and overly-restrictive requirements of Alternative B are legally unnecessary. Excessively rigid regulatory solutions that implausibly rely on requiring the Commission staff to participate personally in

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[33] To the extent the excluded Undertakings do not have the potential to cause effects on historic properties, ACHP Rule 800.3(a)(1) dictates "the agency official has no further obligation under section 106 or this part." *Id.* § 800.3(a)(1).

[34] *See* Draft NPA at Section IV. (Alternative B), A-14 – A-15.

[35] *Id.* at Section IV. n.9 (Alternative B), A-14.

thousands of consultations all over the country will not facilitate better, more efficient review.

As long as the Commission is accessible and able to engage in full consultation with any tribe on any Undertaking at any time, the tribes' rights of government-to-government consultation are fully protected. By assigning the initial responsibility of providing information to and soliciting information from Indian tribes to industry representatives possessing the greatest knowledge of the proposed action, the overall goal of protecting historic properties of religious and cultural significance to these tribes will be enhanced.

Moreover, the procedures specified in Alternative A of the Draft NPA are a lawful delegation, as discussed below, and are vastly preferable to the truncated procedures in Alternative B. Alternative A will better protect both the rights of tribes and their history, while encouraging greater, more flexible and more efficient participation in the Section 106 process by all Indian tribes and NHOs.

a. The FCC Can Lawfully Authorize Applicants to Facilitate Tribal Participation in the Section 106 Process

The ACHP has interpreted the NHPA to allow agencies to permit applicants to initiate Section 106 consultation.[36] According to the ACHP, the FCC can authorize representatives to act on its behalf in initiating the Section 106-review process, identifying and evaluating historic properties, and assessing effects.[37] Such

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[36] *See* Memorandum, *The Delegation of Authority for the Section 106 Review of Telecommunications Projects,* from John M. Fowler, Executive Director, ACHP, to Federal Preservation Officers, SHPOs, THPOs (September 21, 2000) ("*Delegation Memorandum*"). The ACHP's interpretation of NHPA is entitled to deference. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984).

[37] *See Delegation Memorandum.*

authorization is consistent with 36 C.F.R. Part 800.[38] The ACHP, however, also determined that the FCC remains responsible for participating in the consultation process when:

> 1) it is determined that the *Criteria of Adverse Effect* apply to an undertaking;
>
> 2) there is a disagreement between the licensee, applicant, tower construction company, or their authorized representatives and the SHPO/THPO regarding identification and evaluation, and/or assessment of effects;
>
> 3) there is an objection from consulting parties or the public regarding findings and determinations, the implementation of agreed upon provisions, or their involvement in a Section 106 review; or
>
> 4) there is the potential for a foreclosure situation or anticipatory demolition as specified in Section 110(k) of the [NHPA].[39]

Similarly, when it substantially revised its own regulations in 2000, the ACHP rewrote section 800.2(c)(5) to resolve a major problem regarding participation of applicants in the Section 106 process. The ACHP clearly stated that "an agency may authorize a group of applicants to initiate the Section 106 process, rather than being required to grant individual authorizations. Language was also added to clarify that such authorizations do not relieve the federal agency of its obligations to conduct government-to-government consultation with Indian tribes."[40] This language

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[38] *See id.*

[39] *See id.*

[40] Protection of Historic Properties, 65 Fed. Reg. 77698, 77700 (Dec. 12, 2000) (later codified at 36 C.F.R. Part 800).

distinguishes between the initiation of the process and the process of consultation itself.

Alternative A strictly follows the ACHP's memorandum and regulations by allowing applicants and tribes to work together to reach a consensus concerning specific Undertakings while still requiring the applicant to refer all objections and disagreements to the FCC for a determination.[41] The FCC has not delegated to the applicant any power to resolve disputes or make determinations without the consent of the tribe. PCIA agrees that applicants cannot perform such government-to-government consultation duties on behalf of the FCC.[42]

Instead, as described above, Alternative A allows Indian tribes to waive direct government-to-government consultation under Section 106 by simply electing to deal with the applicant directly. At the outset of the process, the applicant must provide potentially affected tribes with written notice of the location and description of the proposed facility and information (including name, address, and telephone number) regarding how to submit comments regarding potential effects on historic properties.[43] If, after the information is supplied, the tribe determines that consultation is either unnecessary or undesirable, it can waive its right to government-to-government consultation simply by not requesting it.[44] If, however, the tribal authority involved

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[41] Alternative A states that in cases of disagreement, "the Applicant shall not commence construction without authorization from the Commission. The Commission, in consultation with the tribe, shall carefully consider all positions and rule on all such disagreements with reasonable promptness." Draft NPA at Section IV.I. (Alternative A) A-13.

[42] *See* 65 Fed. Reg. at 77703 ("Federal agencies are required to consult with Indian tribes on a government-to-government basis pursuant to Executive Orders, Presidential memoranda, and other authorities. The proposed rule was amended to acknowledge this responsibility. The authorization to applicants to initiate consultation does not include consultation with Tribes.")

[43] *See* Draft NPA at Sections IV.E. (Alternative A), A-12 and V.C., A-15 – A-16.

[44] *See id.* at Section IV.A. (Alternative A), A-11.

determines that consultation is either appropriate or necessary, it may request direct consultation with the Commission at any time.[45]

In addition to being consistent with ACHP's regulations and memoranda, Alternative A is similarly in line with federal law addressing the involvement of private applicants in the agency decision making process. Again, Alternative A does not actually delegate any rulemaking or decision-making authority over Indian tribes to applicants. Rather, it only allows the applicant to assume a role in the process, as do many other environmental regulations.[46]

b. Alternative A's Procedures Are Fully Consistent with the FCC's Tribal Consultation Responsibilities

Federal statutes and policies require consultation with Indian tribes on a wide variety of matters.[47] As domestic dependent nations with the powers of self-government,[48] Indian tribes consult with the federal government (or federal agencies) on a

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[45] *See id.* at Section IV.B. (Alternative A), A-11. *See also* 65 Fed. Reg. at 77702 (explaining that "[i]t is the duty of the relevant federal agency (and not the Council) to specify how they meet their government-to-government responsibilities").

[46] The National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.*, for example, allows applicants to play a substantial role in the environmental review process. Under the regulations, an applicant can be permitted to conduct an environmental assessment. *See* 40 C.F.R. 1506.5(b). This document is integral to an agency's determination on whether further environmental review is needed. *See id.* § 1501.3. As long as the action agency retains responsibility for determining whether additional review is needed, this delegation is entirely permissible. *See id.* § 1506.5(b).

[47] See Derek C. Haskew, Federal Consultation with Indian Tribes: Foundation of Enlightened Policy Decisions, Or Another Badge of Shame? 24 Am. Indian L. Rev. 21, 74 n.3 (2000) for a list of authorities requiring federal consultation with Indian tribes.

[48] *See Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831) (explaining that Indian tribes may "be denominated domestic dependent nations. . . . Their relationship to the United States resembles that of a ward to his guardian.").

government-to-government basis.[49] Further, the United States must adhere to certain fiduciary standards in their dealings with federally recognized Indian tribes.[50] The purpose of the consultation requirement is to ensure that tribal views are taken into account in the federal decision making process. To meet this goal, tribal consultation is to occur "in advance with the decision maker or with intermediaries with clear authority to present tribal views to the [agency] decision-maker."[51]

Alternative A of the Draft NPA fully meets the tribal consultation duties imposed under Section 106, the Council's rules, and section 101(d)(6)(B), by providing for extensive consultation opportunities while still creating a streamlined and efficient process for all parties. Specifically, Alternative A establishes a process that enables tribal governments to "request Commission consultation on any and all matters at any time, including when an Undertaking proposed off tribal lands may affect Historic Properties that are of religious and cultural significance to that Indian tribe or NHO."[52]

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[49] *See e.g.,* Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, 65 Fed. Reg. 67249 (November 9, 2000). Although there are numerous Presidential documents and Executive Orders that create tribal consultation procedures, those procedures govern the internal management of the executive agencies. *See* Haskew, 24 Am. Indian L. Rev. at 26. For the purposes of the draft NPA, the only relevant consultation provisions are those included in the NHPA and the Council's rules. *See Hoopa Valley Tribe v. Christie*, 812 F.2d 1097, 1099 (9th Cir. 1986) (finding that unpublished, internal policies are non-binding); *cf. Oglala Sioux Tribe of Indians v. Andrus*, 603 F.2d 707 (8th Cir. 1979) (explaining that the failure of an agency to comply with internal policies declared by the agency to be binding, including the policy of consultation when it has created a justified expectation on the part of Indian tribes, violates general administrative decision making principles and the federal trust obligation to Indian tribes).

[50] *See United States v. White Mt. Apache Tribe*, 537 U.S. 465 (2003).

[51] *Lower Brule Sioux Tribe v. Deer*, 911 F. Supp. 395, 401 (D.S.D. 1995).

[52] Draft NPA at Section IV.B. (Alternative A), A-11.

Moreover, as required in the Council's rules and federal case law, Alternative A provides that a "good faith effort" should be made, meaning more than a "mere request for information," to identify both interested tribes and relevant historic properties.[53] Alternative A addresses such concerns in several instances. For example, section D provides, in part:

> Applicants shall use reasonable and good faith efforts to identify any Indian tribe or NHO that may attach religious and cultural significance to Historic Properties that may be affected by an Undertaking. Such reasonable and good faith efforts may include, but are not limited to, seeking relevant information from the relevant SHPO/THPO, Indian tribes, state agencies, the U.S. Bureau of Indian Affairs ("BIA"), or, where applicable, any federal agency with land holdings within the state . . . . [C]ontacting BIA, the SHPO or other federal and state agencies is not a substitute for seeking information directly from Indian tribes . . . .[54]

Under Alternative A, it is insufficient to rely on a single, potentially inadequate source of information. Furthermore, the process recommends efforts to encourage the participation of the potentially affected Indian tribes. For example, Section F states:

> [A]n Applicant should not assume that failure to respond to a single communication establishes that an Indian tribe or NHO is not interested in participating, but should make reasonable efforts

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[53] Section 106 regulations require the agency to make a "reasonable and good faith effort to carry out appropriate efforts, which may include background research, consultation, oral history, interviews, sample field investigations, and field survey." 36 C.F.R. § 800.4(b). *See also Pueblo of Sandia v. United States*, 50 F.3d 856, 860 (10th Cir. 1995) (explaining that because tribal customs "restrict the ready disclosure of specific information," a "mere request for information alone is not necessarily sufficient to constitute the 'reasonable effort' section 106 requires.") *and Attakai v. United States*, 746 F. Supp. 1395, 1407 (D. Ariz. 1990) (finding that surveys alone are insufficient to satisfy the consultation requirements of the NHPA and that "without consultation with the SHPO or reference to other available information, the Agency Official has no reasonable basis under the regulations to determine what additional investigation aside from a survey may be warranted or the reasonably scope of the survey . . . .").

[54] Draft NPA at Section IV.D. (Alternative A), A-11 – A-12.

> to follow up. Such efforts may include, for example, an additional attempt at written communication, provision of the Submission Packet at the time it is submitted to the SHPO/THPO, and/or where practical, contact by telephone.[55]

This provision is designed to ensure that tribal authorities are given ample opportunity to reply to initial contacts made by applicants, as directed by federal case law.[56] Likewise, to account for cases in which the properties involved are "highly confidential, private, and sensitive," Alternative A mandates that an applicant must honor a tribal request for confidentiality and "shall, in turn, request confidential treatment of such materials. . . ."[57] Incorporation of this provision addresses concerns that "knowledge of traditional cultural values may not be shared readily with outsiders" as such information is "regarded as powerful, even dangerous" in some societies.[58]

Alternative A provides: (1) a flexible and efficient method of gathering and exchanging important information with the relevant Indian tribes and NHOs regarding proposed Undertakings and the existence of, and the Undertaking's potential impacts to, historic properties located off tribal lands that are of significance to tribes; (2) FCC oversight and responsibility for providing continuous agency availability to tribes and real opportunity for meaningful consultation before a decision is made regarding a federal Undertaking; (3) guidance for applicants to make a good faith effort to

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[55] *Id.* at Section IV.F. (Alternative A), A-12.

[56] Of course, 36 C.F.R. Part 800 includes specific deadlines that should be followed within the draft NPA. Alternative A should be drafted in a manner consistent with those deadlines, while still providing an adequate opportunity for tribal authorities to respond. Without such deadlines, PCIA believes that it will be difficult to apply section F of Alternative A because the timing of the notice period will be indefinite.

[57] Draft NPA at Section IV.J. (Alternative A), A-13.

[58] *See Pueblo of Sandia*, 50 F.3d at 861 (citing National Register Bulletin 38).

identify properties of traditional religious and cultural importance and to elicit response from Indian tribes in a manner sensitive to the confidential nature of such information.

c. Requests for Confidentiality

USET proposes certain revisions to Section IV.J. of the Draft NPA, which relates to requests by tribes and NHOs for confidential treatment of information and materials. Both proposals should be rejected as they will unnecessarily complicate the Section 106 process and lead to no greater protection for confidential materials than the Draft NPA currently affords.

USET requests that confidentiality requirements be applied to all consultations with Indian tribes and NHOs under Section 106 whether or not confidentiality has been requested.[59] If accepted, this proposal will encumber and complicate the Section 106 process for all parties by requiring confidential handling of non-confidential material. Moreover, the proposal is unnecessary in light of the confidentiality obligations already in place in the NHPA and the ACHP rules. At a minimum, given the costs and burdens associated with the handling of confidential material, Indian tribes and NHOs should be required to indicate whether confidential treatment is necessary. As currently drafted, Section IV.J. of the Draft NPA complies with the NHPA and the Council's rules and should be adopted.[60]

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[59] Draft NPA at Section IV.J. n.8 (Alternative A), A-13.

[60] Section 304 of the NHPA sets forth the FCC's confidentiality obligations with respect to "the location, character, or ownership of a historic resource" and obligates the Commission to withhold such information *only* in certain well-defined circumstances. As currently drafted, Section IV.J. (Alternative A) of the Draft NPA expressly references the right of all Indian tribes to request confidential treatment under Section 304 of the NHPA and guarantees that the "Applicant shall honor this request." Draft NPA at Section IV.J. (Alternative A), A-13. If the Applicant forwards confidential materials to the Commission, pursuant to this provision of the Draft NPA, "[t]he Commission shall provide such confidential treatment consistent with applicable federal laws." *Id.*

In addition, adopting USET's proposed requirement would certainly complicate or contradict other streamlining measures proposed in the Draft NPA. Accordingly, the USET proposal should be rejected as inconsistent with the NHPA, and the ACHP rules. Section IV.J. of the Draft NPA should be retained.

In summary, Alternative A meets all of the requirements of the Section 106 process while at the same time properly addressing all of the Commission's obligations to tribes under federal law, internal procedures and treaties, and at the same time allowing for the efficient resolution of the Section 106 review process. USET's unwieldy and unnecessary Alternative B should be rejected.

C. Clarifying Undertakings

1. The Applicability and Scope of the NPA Must Be Clear

Under Section I, entitled "Applicability and Scope of this Nationwide Agreement," the Draft NPA ambiguously states it is applicable to "certain" Undertakings. The FCC lists examples of Undertakings in Attachment 2, which includes most, if not all, of the permits provided by the Wireless Telecommunication and Media Bureaus. Neither the Draft NPA nor Attachment 2, however, clearly identifies which of those Undertakings come under the jurisdiction of the Draft NPA. If the intent of this document is to apply to the construction of new towers and to Collocations that are not covered by the Collocation Agreement, this should be clearly stated under Section I. For the purposes of the NPA, the term "Undertaking" should be defined to mean

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Neither Section 304 nor the Council's rules require that confidentiality requirements be applied to all consultations with Indian tribes under Section 106.

only those Undertakings subject to the NPA to avoid the current confusion created by the inartful use of that term throughout the draft NPA.

2. The NPA Is Only Applicable to Undertakings

The Draft NPA rightfully recognizes that maintenance and servicing of towers, antennas and associated equipment are not deemed to be Undertakings subject to Section 106 review.[61] However, as discussed in more detail below, Section III of the Draft NPA expressly excludes from Section 106 review "modifications of Towers and associated excavation that do not involve a Collocation and does not substantially increase the size of the existing Tower, as defined in the Collocation Agreement," hereinafter referred to as "Exclusion 1." This exclusion wrongfully implies that modifications involving collocations are Undertakings. The final NPA must be drafted to recognize that, just as in the case of maintenance and service, such activities are not subject to Section 106 review *ab initio.*

The term "Undertaking" is defined by the NHPA as "a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; those requiring a Federal permit, license or approval; and those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency."[62] For the purposes of the Draft NPA, the only activities that subject the Commission to Section 106 are those "requiring a Federal permit, license or approval." Modifications to towers that do not involve collocations are not subject to the "permit, license or approval" of the Commission, and therefore, are not Undertakings.

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[61] Draft NPA at Section I.B.

[62] 36 C.F.R. § 800.16(y).

As currently drafted, given the broad definition of "tower" and Exclusion 1, the construction of a new fence, the installation of an air conditioner, the extension of an access road, the planting of new shrubs or the installation of a generator, among other things, might be considered to be Undertakings under the Draft NPA. Certainly, these routine tower activities, unrelated to collocations, are not subject to the Commission's license, permit or approval authority and should not be considered Undertakings. Moreover, the Commission has no statutory authority to regulate these activities. As currently drafted, Exclusion 1 is *ultra vires* and ripe for judicial review. PCIA requests that the Commission delete Exclusion 1 and clarify under Section 1.B. that modifications to towers that do not involve collocations are not within the scope of the NPA.

3. Tower Construction Per Se Is Not an Undertaking

Nor does tower construction and registration by a non-licensee qualify as an Undertaking. Such action is not subject to Section 106 review. Noted in the previous section, an "Undertaking" by a private party requires federal financial assistance or a federal permit, license or approval.[63] Clearly, this definition does not embrace tower construction that does not require registration. With respect to unregistered towers, there is no action carried out by the agency, no federal financial assistance, no permit or approval required, and no federally delegated state or local regulations.

Nor does the mere act of registration qualify tower construction as an "Undertaking." Although tower registration requires some action on the part of the FCC, that action is purely ministerial. FCC regulations set forth registration criteria, which if met, automatically result in registration.[64] Because no agency discretion is required,

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[63] *See id.*

[64] *See generally* 47 C.F.R. Part 17.

NHPA is not triggered.[65] Section I. of the Draft NPA must be clarified on these issues.

D. Application of Defined Exclusions

Where the TWG has identified classes of Undertakings that present little or no ability to cause adverse effects to historic properties, the final NPA should clearly exclude those Undertakings from the Section 106 review process. Each such exclusion must be clear, workable and easy to understand and apply. Each exclusion should also be objective, and self-executing. No exclusions should require consultation or the application of a secondary or subjective test. Section III.A. should be revised as proposed in Attachment A to more accurately describe the legal effect of an excluded undertaking under the NHPA and the ACHP's rules.

As noted previously, the exclusion from Section 106 review of certain Undertakings is expressly permitted under the rules of the ACHP and advances the important streamlining goal of regulating only when needed to protect historic resources.[66] Moreover, because the vast majority of Section 106 tower reviews produce findings of no effect or no adverse effect,[67] excluded Undertakings ensure that the limited compliance-related resources available to both federal and state regulators are available for the small number of communications projects that truly have a significant effect on historic properties.

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[65] *See, e.g., Sugarloaf Citizen Ass'n v. FERC*, 959 F.2d 508, 513-15 (4th Cir. 1992) (finding that where the Federal Energy Regulatory Commission did not have the authority to reject an application for small power production facility certification, if all the prerequisites were met, environmental and NHPA review requirements were not triggered).

[66] *See* Section (I)(B)(1)(a).

[67] In a 2002 meeting of the TWG, the Ohio SHPO reported on a survey their office had performed showing that more than 97% of Section 106 reviews of communications towers in that state resulted in findings of no effect. Other SHPO staff reported similar findings in their states.

Six proposed excluded "Undertakings" are set out in Section III.A. of the Draft NPA:

1. Modifications that do not involve collocations and do not substantially increase the size of an existing tower;
2. Construction of a replacement tower that does not substantially increase the size of the existing tower or expand the property boundary;
3. Construction of temporary wireless facilities;
4. Construction of facilities less than 400 feet in height on land used for industrial, commercial or government office purposes;
5. Construction of facilities less than 400 feet in height located near government rights-of-way, highways or railroad corridors; and
6. Construction of facilities in an area previously designated as an exclusion zone by the SHPO/THPO.[68]

As noted above, modifications of towers and associated excavations are not Undertakings under the ACHP rules and this exclusion should be removed from the Draft NPA. PCIA strongly supports the exclusion of replacement towers from all consultation and review requirements, and agrees that this exclusion should include extensions of the compound and excavation by "30 feet in any direction" with the qualifier that the such extension applies to "leased or owned property." PCIA urges the Commission to adopt this provision without revision.

PCIA also supports the exclusion of any "temporary communications Tower, Antenna Structure or related facility[,]" where "temporary" is defined as not more than 24 months.[69] The consequences of exceeding this authorized tenure, however, should be clearly set forth in the final NPA. The industrial area exclusion is overly complicated.

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[68] Draft NPA at Section III.A., A-8 – A-9.

[69] *Id.* at Section III.A.3., A-8.

PCIA urges the Commission to simplify the scope of this exclusion so that it can more easily be applied in a manner that would encourage meaningful streamlining.

The transportation corridor exclusion has been greatly improved, but still requires the tower to be on "previously disturbed ground."[70] This exclusion was always designed to address visual effects only and should continue to do so. PCIA's proposed revision of the visual effects definition in Section VI of the Draft NPA would virtually eliminate the need for this exclusion. Despite the drawbacks to the right-of-way/transportation corridor exclusion, PCIA disagrees with the suggestion by the National Trust and NCSHPO that states should selectively be able to "opt out" of the exclusion. Such a right would greatly erode the effectiveness of this valid exclusion.

The transportation corridor exclusion should apply to all trains, not just passenger trains, as they share the same characteristics.

Finally, the SHPO-designated exclusion area provision fails to create any incentive for its use; thus, its likelihood of producing any beneficial effect is minimal. Accordingly, the NPA should require SHPOs to make a good faith effort to identify areas near population centers and highways where they would prefer towers to be developed.

E. Clarifying the Assessment of Visual Effects

The problem of assessing and quantifying visual effects caused by construction of towers has long been the most contentious and time-consuming aspect of Section 106 tower review. PCIA believes that much of the problem is the product of misunderstanding about the nature of visual effects under Section 106.[71] Below,

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[70] *Id.* at Section III.A.5., A-9.

[71] Two potential sources of misunderstanding can be found in the ACHP's Section 106 rules, which explain that an "adverse effect" can include the "[i]ntroduction of visual, atmospheric or audible

PCIA proposes an approach towards visual effects, which may seem novel at first blush, but is grounded in the ACHP's rules and the authoritative guidance of the National Register and provides a clear and objective solution for this unique and important part of the Section 106 process.

1. Understanding Visual Effects from Tower Projects

As the definition of the term "effect" in the Draft NPA implies, in order to be considered under Section 106, visual effects, like all other effects, must change or alter a historic property itself.[72] The ACHP's rules define "effect" as an "alteration to the characteristics of a historic property qualifying it for inclusion in, or eligibility for, the National Register."[73] The two necessary qualities for eligibility, therefore, are significance and integrity. That is, for a property to qualify for the National Register, it must: (1) be associated with an important historic context; and (2) it must retain the historic integrity of those features necessary to convey the property's significance.[74]

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elements that diminish the integrity of the property's significant historic features[]" and "may include reasonably foreseeable effects that may occur later in time, be farther removed in distance or be cumulative." 36 C.F.R. § 800.5(a)(1), (2). Some involved in the Section 106 review process read these two definitions together to apply to the "introduction of visual elements farther removed in distance[]" As described herein, however, these definitions should not be applied to remove the requirement that an adverse effect must alter a physical feature of the historic property itself.

[72] Thus, the mere visibility of a tower from an historic property might be described as having an aesthetic effect. Aesthetic effects can impact one's perception of beauty or good taste and can alter the mood or perception of a viewer. Unless they also alter a physical feature of a historic property's eligibility, however, they are not Section 106 effects. This is not to say that aesthetic effects are unimportant or completely irrelevant to Section 106. Aesthetic effects can be significant and are properly considered by land-use and zoning authorities. Moreover, where an Undertaking physically affects a historic property, Section 106 properly requires assessment and perhaps mitigation of any associated aesthetic effects, for example to the property's integrity of feeling.

[73] *Id.* § 800.16(i). This definition has been proposed verbatim in the Draft NPA.

[74] United States Department of the Interior**,** National Park Service, National Register Bulletin 15, " How to Apply the National Register Criteria for Evaluation," (Revised 1997) http://www.cr.nps.gov/nr/publications/bulletins/nrb15/, (Revised for the Internet, 1995) ("*National Register Bulletin 15*") at 3.

The National Register's four criteria of significance define the association that must exist between a historic property and historically significant persons, events, characteristics or information.[75] A property's integrity is measured in one or more of seven aspects of its physical features, including its: (1) location; (2) design; (3) setting; (4) materials; (5) workmanship; (6) feeling; and (7) association.

Because effects from a federal Undertaking typically cannot alter a historic property's significance, Section 106 review focuses exclusively on characteristics of integrity. In this regard, the National Register guidance states that "[t]he evaluation of integrity is sometimes a subjective judgment, but it *must always be grounded in an understanding of a property's physical features* and how they relate to its significance."[76]

Thus, because all aspects of a historic property's integrity are manifest in its physical features of that property, in order to alter an aspect of integrity, an effect under Section 106 must alter one or more of the physical features of the property itself.[77]

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[75] The National Register defines the four criteria for evaluation as follows:

> The quality of significance in American history, architecture, archeology, engineering, and culture is present in districts, sites, buildings, structures, and objects that possess integrity of location, design, setting, materials, workmanship, feeling, and association, and: A. That are associated with events that have made a significant contribution to the broad patterns of our history; or B. That are associated with the lives of persons significant in our past; or C. That embody the distinctive characteristics of a type, period, or method of construction, or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction; or D. That have yielded, or may be likely to yield, information important in prehistory or history.

National Register Bulletin 15, at 2.

[76] *Id*. at 44 (emphasis supplied).

[77] The same is true for adverse effects. The Council's regulations define "adverse effect" as an "effect" that diminishes one of the seven aspects of a property's integrity. Because the aspects of

In most cases, visual effects from a tower would not affect an historic property's location, design, workmanship, materials, or association.[78] For this reason, the two remaining aspects of integrity involving "setting" and "feeling" are most often implicated in the analyses of visual effects.

The National Register defines feeling as "a property's expression of the aesthetic or historic sense of a particular period of time. It results from the presence of physical features that, taken together, convey the property's historic character."[79] Thus, a tower project would affect a property's feeling only if it inhibited a property's ability to express its own historic character.

The National Register defines setting as "the physical environment of a historic property."[80] Where integrity of setting is an element of National Register eligibility, however, the relevant physical environment is not the same as the "viewscape" from the property. The evaluation of setting for eligibility purposes is limited to a specific geographic area, generally defined by the description of the property's boundary of

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integrity are at the same time characteristics that must be altered to find an effect, in practice adverse effects differ little, if at all, from mere effects. *Compare* 36 C.F.R. § 800.16(I) ("Effect means alteration to the characteristics of a historic property qualifying it for inclusion in or eligibility for the National Register.") *with* 36 C.F.R. § 800.5(a)(1) ("An adverse effect is found when an undertaking may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association."). The Draft NPA instructs applicants to evaluate effects and use the definition provided by Rule 800.5(a)(1) as guidance. Draft NPA at Section VI.E.1., A-19.

[78] A property's integrity of association is defined as "the direct link between an important historic event or person and a historic property." *National Register Bulletin 15,* at 45.

[79] *Id*.

[80] *Id.* Furthermore, "[w]hereas location refers to the specific place where a property was built or an event occurred, setting refers to the *character* of the place in which the property played its historic role. It involves *how* not just where, the property is situated and its relationship to surrounding features and open space." *Id*. (Emphasis supplied).

historic significance in its nomination.[81] Boundaries should encompass all the resources that contribute to the property's historic significance.[82] Therefore, it is clear that the protected setting of any historic property is the setting within the property's boundary of historic significance.

Applying the National Register's guidance, therefore, in order to find an effect or an adverse effect to the setting or feeling of a property from a tower, one would have to find an alteration or diminishment of the physical environment or physical features of

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[81] United States Department of the Interior, National Park Service, Form 10-300, "National Register of Historic Places Inventory – Nomination Form," Section 10 – "Geographical Data" (providing requests for an acreage and both the coordinates and a verbal boundary description); *see also* United States Department of Interior, National Park Service, National Register Bulletin "Defining Boundaries for National Register Properties," at 1 ("*Defining Boundaries Bulletin*") ("Among the decisions a preparer must make is the selection of the property's boundaries: in addition to establishing the significance and integrity of a property, the physical location and extent of the property are defined as part of the documentation."); United States Department of Interior, National Park Service, National Register Bulletin 16(a), "How to Complete the National Register Registration Form" at § III ("*Completing NR Form Bulletin*") ("Carefully select boundaries to encompass, but not to exceed, the full extent of the significant resources and land areas making up the property. The area to be registered should be large enough to include all historic features of the property, but should not include 'buffer zones' or acreage not directly contributing to the significance of the property. Leave out peripheral areas of the property that no longer retain integrity, due to subdivision, development, or other changes.").

[82] *See Defining Boundaries Bulletin*, at 1. The guidance also provides that "appropriate correspondence [should exist] between the factors that contribute to the property's significance and the physical extent of the property." *Id.* at 2. Furthermore, the National Park Service's rules list several justifications for altering a historic property's boundary, including recognition of additional areas with historic significance. Regarding the expansion of boundaries, these rules explain: "No enlargement of a boundary should be recommended unless the additional area possesses previously unrecognized significance in American history, architecture, archeology, engineering or culture." 36 C.F.R. § 60.14(a)(2). Thus, the NPS rules suggest that historically significant areas should be contained within the historic property's *listed* boundary.

Under the ACHP's Section 106 rules, the boundary specified in a National Register nomination is not necessarily to be considered definitive if the nomination is older or if the assessment of the boundaries was originally uninformed by modern standards or is otherwise incomplete. *See* 36 C.F.R. § 800.4(c)(1) ("The passage of time, changing perceptions of significance, or incomplete prior evaluations may require the agency official to reevaluate properties previously determined eligible or ineligible.").

that particular property, or an inhibition from the tower that prevents those features from conveying the property's significance, thus causing an alteration of those features.

2. Appropriate Consideration of Visual Effects Under Section 106

As described above, in a Section 106 review, the alteration or diminishment of integrity of physical features of a historic property is the relevant focus of a proper analysis of all effects, including visual effects. Therefore, the most logical primary APE for any communications Undertaking would typically be the area of ground disturbance and other potential physical changes that might be expected to be caused by the project. Only if an Undertaking sits on or within the boundary of a historic property would it ordinarily alter the physical characteristics of such property. Where an Undertaking is located outside of the boundary of a historic property, its ability to visually effect or alter that property in such a way as to inhibit its ability to convey its own historic significance would be very limited. The possible ways of creating this kind of effect are difficult to predict, but might involve, for example, casting a shadow that alters the physical view of the property. For properties whose integrity of feeling is a qualifying characteristic (the property's ability to evoke a feeling of a particular time and place), a tower blocking the view of such property from the only, or most important, vantage point might create such an effect.

It is clear, however, that for most tower Undertakings, the most logical presumed APE would consist of only the footprint of the tower and its supporting facilities, together with any associated new excavation for utility trench(es) or access road(s). This APE would take into account almost all possibilities of physical alteration to an historic property. To account for the rare case of an historic property not physically impacted by construction, but near enough that the tower might prevent the property from conveying its historic significance, the APE might also include the immediate

(i.e., radius of a hundred yards) area around the tower site. Such an APE should be adequate to identify those rare cases of properties outside the boundary that nevertheless might be said to cause an alteration of the property's physical features. PCIA acknowledges that this approach is very different from that typically used by most SHPOs today and would result in vastly smaller presumed APEs than those proposed in the *NHPA Notice*. [83] Nevertheless, this approach appropriately considers the nature and limits of visual effects under Section 106 and remains grounded in the ACHP's rules and the prevailing authoritative legal guidance from the National Register. As such, PCIA submits that its approach should likewise guide the Commission and the analysis of visual effects in the NPA.

3. Practical Application of a Boundary-Centric Visual Effects Approach

Once a tower site is located, the initial step in the Section 106 process is to first determine the APE and then determine if any historic property falls within that APE. For towers assessed under the above-described approach to visual effects, this would involve noting the probable extent of ground disturbance and any historic properties in the immediate area of the project. Contrary to current assumptions, except in extreme cases, the presumed APE should not vary with the height of the tower; nor should the potential visibility of the tower at a distance, where no physical alteration of a historic property is involved, be considered relevant to the Section 106 review. In most cases, determining whether a tower's physical footprint falls within the boundary of a historic property should be relatively straightforward. Where historic properties are located nearby, however, or when such property might encompass larger areas, such as districts or landscape-based properties like designed or rural

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[83] *See* Draft NPA at A-17.

landscapes, it will be necessary to confirm the boundary of historic significance for such properties to determine whether or not the project lies physically inside of that boundary.[84]

This approach provides practical guidance for the Commission, its applicants, consulting parties, SHPOs/THPOs, and Indian tribes in the assessment of visual effects, and ensures that the Section 106 review process is not used improperly to impose general land-use or aesthetic preferences, but as originally intended – to preserve historic properties. Without such guidance, the scope of the Section 106 review for towers will continue to be so broad that it unreasonably and unproductively scatters and dilutes the resources available for historic preservation and unnecessarily hinders the expansion of the crucially needed wireless telecommunications network.

F. Limiting Section 106 to Listed and Determined Eligible Properties Only

PCIA does not concede that Section 106 review applies to properties that meet National Register eligibility criteria, but that have not been determined eligible for, or actually listed in, the National Register. Section 106 review is limited to listed and determined eligible properties only.

Under the regulations of the National Park Service ("NPS") – the bureau of the Department of Interior that is responsible for administering the National Register – it is the role of the Keeper of the National Register to determine the eligibility of a property for inclusion on the National Register.[85] As the Commission notes in its

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[84] PCIA does not concede that properties not determined eligible for national registration are to be considered under Section 106.

[85] *See* 36 C.F.R. § 60.3(c) (defining "determination of eligibility" as "a decision by the Department of Interior that a district, site, building, structure or object meets the National Register criteria for

proposed Rule 1.1307(a)(4), the National Register is regularly updated and re-published each year. In addition, every February, the National Register publishes in the Federal Register an updated list of properties "determined eligible."[86]

The legislative history of the 1976 amendments to Section 106 suggests that in using the phrase "determined eligible," Congress intended to further the principle that consultation under the NHPA was required for (1) properties already listed on the National Register or (2) properties determined eligible for listing by the Secretary of Interior.[87] Thus, the meaning of the term "eligible for inclusion in" as used in the NHPA,[88] and specifically "determined eligible" in 101(d)(6)(A), make clear that the

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evaluation although the property is not formally listed in the National Register"); 36 C.F.R. § 60.3(f) (defining "Keeper of the National Register" as "the individual who has been delegated the authority by the NPS to list properties and determine their eligibility for the National Register"); 36 C.F.R. § 60.9 (requiring federal agencies to establish programs "to locate, inventory, and *nominate to the Secretary* all properties under the agency's ownership or control that appear to qualify for inclusion on the National Register") (emphasis supplied). *See also* 36 C.F.R. § 60.3(h) (defining National Park Service as bureau of DOI to which the Secretary of Interior has delegated the authority and responsibility for administering the Nation Register program); 36 C.F.R. § 63.2 (setting forth process for how a federal agency can request a formal determination of eligibility from the Department of Interior); 36 C.F.R. § 63.3 (stating that even when the federal agency and SHPO agree on the eligibility of a property, the Keeper may inform them that the property has not been "accurately defined and evaluated" therefore they may only consider the property "eligible" for purposes of obtaining comments from the Advisory Council).

[86] *See* 36 C.F.R. § 63.5 ("[P]ublic notice of properties determined eligible for the National Register will be published in the FEDERAL REGISTER at regular intervals and in a cumulative annual edition usually issued in February.").

[87] In adding the "eligible for inclusion" language to the NHPA in 1976, Congress made clear that the language was a "housekeeping amendment" and covered only properties "determined to be eligible for inclusion in the National Register." *See* S. Rep. No. 94-367, at 13 (1975), *reprinted in* 1976 U.S.C.C.A.N. 2442, 2450. Furthermore, the NPS' rules explain that "[t]he National Register is an *authoritative* guide to be used by Federal, State, and local governments, private groups and citizens to identify the Nation's cultural resources and *to indicate what properties should be considered for protection from destruction or impairment*." 36 C.F.R. § 60.2 (emphasis supplied). Thus, under the Secretary's rules, the National Register presents the universe of those properties to be protected under the preservation laws.

[88] The FCC should be aware of the apparent contradictory approaches for defining "eligible" properties in the legislative history of the NHPA and the NPS's rules on the one hand, and the ACHP's rules on the other.

NHPA requires consultation for properties of traditional religious and cultural importance that have been determined eligible by the DOI. Indeed, the ACHP, itself, has clarified that its rules do not grant tribes the de facto ability to designate any property to which they attach religious or cultural significance.[89]

Federal courts too have recognized that when Congress' 1976 amendments to the NHPA extended coverage to "eligible" properties, the intent of the Act was to "afford some measure of protection to properties on which there has been some determination of eligibility for inclusion on the National Register."[90] A number of federal decisions rely on the meaning of the ACHP's regulations in finding that Section 106 applies to properties that meet the criteria without an official determination; however, these courts do not address the meaning of the term "eligible for inclusion in" pursuant to its legislative history.[91]

Accordingly, the consideration of any historic properties that have not been determined eligible by the Keeper of the National Register, is beyond the scope of the NHPA.

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[89] *See* 65 Fed. Reg. at 77,706 ("The fact that a Tribe attaches religious and cultural significance to [properties] does not make them 'historic,' but neither does it preclude them from meeting the National Register criteria. The Federal Agency makes the determination of eligibility, and disputes are ultimately resolved by the Keeper based on the secular National Register criteria.").

[90] *Birmingham v. General Services Realty Co.*, 497 F. Supp. 1377, 1388 (N.D. Ala. 1980) ("A literal construction of the phrase 'eligible for inclusion in the National Register' would, under broadly stated criteria for eligibility . . . lead almost inescapably to the conclusion that every building over fifty years old in this country is eligible for inclusion on the Register."). *See also Committee to Save the Fox Building v. Birmingham Branch of the Federal Reserve Bank of Atlanta*, 497 F. Supp. 504, 512 (N.D. Ala. 1980) (finding property eligible under National Register criteria, but concluding that no agency had determined that the building was eligible).

[91] *See Boyd v. Roland*, 789 F.2d 347, 349 (5th Cir. 1986); *Colorado River Indian Tribes v. Marsh,* 605 F. Supp. 1425, 1437 (C.D. Cal. 1985).

II. Other Issues Raised in the NPRM

A. Applicants Should Handle Confidentiality Requests

In addition to the guiding principles discussed above, which PCIA urges the Commission to adopt and apply in finalizing the Draft NPA, PCIA provides the following comments regarding other issues raised in the NPRM.

The Council has proposed revisions to the second and third sentences of Section IV. J as follows: "If a Tribe or Native Hawaiian Organization requests confidentiality from the Applicant, the Applicant shall notify the Commission. The Commission shall honor this request and shall, in turn, request confidential treatment of such materials or information consistent with applicable Federal laws." This proposal unnecessarily complicates the process as applicants are capable of maintaining the confidentiality of specified materials without Commission intervention. The only role for the Commission in this context should be to resolve disputes arising from confidentiality requests.

PCIA encourages the Commission to reject the Council's proposal and retain Section IV.J as drafted because it complies with Section 304 of the NHPA and applicable federal laws.

B. Pending Section 106 Reviews

The Commission requests commenters to provide responses regarding how it should treat Section 106 reviews pending before Indian tribes, SHPOs, or the Commission on the date the NPA becomes effective.[92] PCIA urges the Commission to apply the NPA, including its exclusions and the timing provisions, only to future historic preservation reviews initiated after the adoption of the NPA. PCIA believes that it

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[92] *NHPA Notice*, at ¶ 4.

would not be fair to apply the terms of this NPA retroactively to Undertakings initiated when neither regulators nor industry knew exactly what the NPA might provide.

C. Proposed Changes to Section 1.1307(a)(4)

PCIA supports the Commission's proposed amendments to the wording of its environmental rules involving revision to the text of Section 1.1307(a)(4) deletion of the Note to that provision.[93] The current text of Section 1.1307(a)(4) and its Note fail to delegate any of the Commission's Section 106 obligations to applicants, stating only an applicant "*may*" contact the appropriate SHPO when assessing whether a proposal affects a historic property.[94] Although PCIA generally believes additional requirements are not in the public interest (as indicated by the key principles discussed above), PCIA agrees that an applicant's obligations under the NHPA must be clearly defined. As such, it supports the proposed revisions to Section 1.1307(a)(4).

D. Miscellaneous Provisions

PCIA provides the following general comments regarding various provisions of the Draft NPA not discussed above. These suggestions and others are continued in redline format in the copy of the Draft NPA attached hereto as Attachment A.

1. Whereas Clauses and Section I

The 4th Whereas clause should be revised to replace "may affect" with "adversely affects." Current FCC policy is that an EA is only required if the undertaking would adversely affect Historic Properties, not if it simply "may affect." In addition, the

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[93] *See* Errata, *Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process*, WT Docket No. 03-128, DA 03-2116 (rel. July 1, 2003).

[94] 47 C.F.R. 1.1307(a)(4) Note.

term "properties" should be changed to "Historic Properties" and the phrase "that meet the National Register criteria" should be eliminated as "Historic Properties" can include more than just those that meet the National Register criteria.

The 6th Whereas clause should be revised to replace the phrase "their facilities" with "Undertakings" as the Section 106 review process applies only to undertakings. The 13th Whereas clause should be revised to reflect the full scope of the Commission's efforts to consult with Indian tribes and NHOs throughout the development of the Draft NPA. In the 17th Whereas clause, the FCC fails adequately to explain how, if it is not delegating "consultation responsibilities," what authorization is being given to allow applicants, even with an express or implied waiver from an Indian tribe, to participate in and legally conclude the Section 106 process. PCIA recommends revising this Whereas clause as indicated in Attachment A to make the delegation of authority express. A new 21st Whereas clause is required to make clear that the proposed excluded undertakings have been approved by the ACHP as required under Section 214 of the NHPA.

PCIA approves of the fact that the final Whereas clause encourages but does not require the use of qualified professionals. PCIA members always strive to utilize consultants that are well qualified to render the opinions they are asked to provide, but the necessary qualifications standards are not always universally accepted or agreed upon, and some standards differ from state to state.[95]

The status of the facilities on the list of FCC Undertakings (Attachment 2) is made unclear by the use of the phrase "Undertakings . . . may occur" in Section I.A. As the list should clearly designate which activities constitute "Undertakings," PCIA

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[95] Draft NPA, Final Whereas Clause, A-3.

urges the Commission to either revise or remove this language.[96] PCIA supports Section I.B. which stipulates that the maintenance and servicing of towers, antennas, and associated equipment is not an "Undertaking" and is therefore excluded from these historic preservation requirements.[97] PCIA urges the Commission to acknowledge in Section I.B. that modification of or associated excavation at a facility that does not involve a collocation is not an undertaking.

PCIA also supports the statement in Section I.D. that the NPA does not apply on tribal lands, unless otherwise adopted by a tribe to apply to its lands.[98] While PCIA agrees as stated in Section I.D. that a tribe may elect to perform the duties of a SHPO/THPO for Undertakings on tribal lands, with or without assuming SHPO function, the tribe, in either case, should be required to abide by the limitations and guidelines for SHPO functions under the Department of the Interior Grants Manual and the NPA.[99] In other words, the NPA should clarify that if the tribe assumes the role of a SHPO, it must also assume the responsibilities applicable to the SHPO.

Section I.E., which addresses the scope of the NPA, requires further revisions, as the precise meaning of the language is unclear.[100] First, the section fails to recognize that the NPA excludes certain Undertakings and thus no EA will be required when an exclusion under the NPA applies. Second, the section should clarify that findings or corrected findings of "conditional no adverse effect" do not require an environmental assessment. PCIA urges the Commission to revise Section I.F. to exclude explicitly

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[96] *Id.* at Section I.A., A-4.

[97] *Id.* at Section I.B., A-4.

[98] *Id.* at Section I.D., A-4.

[99] *Id.* at Section I.D., A-5.

[100] *Id.* at Section I.E., A-5.

the Commission *and* the ACHP, and should allow this agreement to control where the FCC is working in concert with other agencies and all concur as to the effect of the proposed project.[101]

2. Section II

PCIA supports the proposed definition of "Antenna" in Section II.A.1., which includes associated equipment and structures. This definition should be adopted without revision.[102] The definition of "Adverse Effect" based on the one in the ACHP rules should be added to the NPA.[103] The definition of the term "Applicant" should be revised to reflect the fact that the FCC's rules place different responsibilities on different parties in the Section 106 process.

The word "existing" should be removed from the definition of "Collocation" because even the first antenna on a tower is a collocation subject to the Nationwide Collocation Programmatic Agreement, not the Draft NPA. The definition of "Historic Properties" should be revised as suggested above.

PCIA supports the proposed definition of "tower" at Section II.A.12., which includes associated equipment and structures not installed as part of an antenna, but recommends removing the qualifier "Commission licensed or authorized" as this is unnecessary, given the definition of tower.

3. Sections III and IV

Throughout Section III, the FCC uses the terms "tower," "communications tower" and other variations on defined terms. The Commission should conform references in the Draft NPA so that it uses consistent, defined terms only.

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[101] *Id.* at Section I.F., A-5.

[102] *Id.* at Section II.A.1, A-5.

[103] *Id.* at Section II.A.2 (new), A-6.

The procedures for an Applicant notifying tribes that have been identified as potentially interested in an undertaking which are set forth in Sections IV.E. and F. of the Draft NPA are unclear and fail to provide clear-cut time limits. As substitute, PCIA suggests notifying such tribes at least 21 days (not 30) prior to the applicant's submission of the Submission Packet. While PCIA supports the minimum tribal communication requirements contained in Section IV.F., it suggests that the Commission further refine the potential timeframes, as too much flexibility or too many alternatives may cause confusion and delay and prove counterproductive.[104] PCIA also suggests clarifying that timely provision to a tribe or NHO of a Submission Packet following an appropriate initial communication is *prima facie* evidence of a reasonable effort to follow up.

PCIA asserts that Section IV.G. should be revised to ensure that tribes provide an explanation and justification of its allegations of adverse effect with any objection regarding Historic Properties.[105] If a tribe fails to provide this explanation (and provides only a terse negative response), or otherwise indicates it has no objections, further consultation should not be required.

PCIA opposes the Commission's suggestion in Section IV.H. that applicants must provide Submission Packets to every identified tribe, apparently whether or not the tribe has indicated any interest; such a requirement would be very wasteful and difficult to implement.[106] Rather, the Agreement should only require submission of materials to those Indian tribes that have indicated an interest to receive such

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[104] *Id.* at Section IV.F., A-12.

[105] *Id.* at Section IV.G., A-13.

[106] *Id.* at Section IV.H., A-13.

materials, or where the applicant decides to use the Submission Packet as its follow-up to the initial communication.

4. Section V

PCIA agrees with the requirement in Section V.A. that Applicants must notify the local government, as it tracks and clarifies current law.[107] PCIA also agrees with the Commission's proposal in Section V.B. for requirements regarding notifying the public, as it clarifies and makes more flexible the current applicable requirements.[108] Section V.D., which permits SHPOs to provide lists of groups that "should be provided notice" is broader than the requirements of current law.[109] As such, if the NPA includes this provision, it must also clarify that notice to those on the list shall be suggested, but not required. Section V.E. should be revised to clarify that the Submission Packet is the operative document and that commenting parties are limited to a 30 day review period, as suggested above.

PCIA strongly supports the Verizon, Ohio SHPO and NCSHPO suggestion for the setting of a specified period – *e.g.*, 30 days from submission of the Submission Packet to the SHPO/THPO – for public response. PCIA also concurs with CTIA's suggestion that proprietary information submitted by industry be protected as confidential.[110]

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[107] *Id.* at Section V.A., A-15.

[108] *Id.* at Section V.B., A-15.

[109] *Id.* at Section V.D., A-16.

[110] *Id.* at Section V.F., A-16. Note 11.

5. Section VI

In addition to those issues regarding this section discussed above, PCIA agrees that for a non-excluded collocation, the assessment of effect should consider only those effects from the collocation, not from the existing supporting tower.[111]

6. Section VII

PCIA supports the clear procedures set forth in Section VII.A.1. for: (1) initial determination of effects; and (2) submission of packets to SHPO and all consulting parties.[112] PCIA believes the Draft NPA must include language in Section VII.A.2. providing a clear 30-day objection period for consulting parties, including Indian tribes and NHOs, as currently provided under existing law pursuant to 36 C.F.R. § 800.5(c)(2)(i).[113]

PCIA disagrees with the 26- to 30-day extended comment period in Section VII.A.3, which provided the SHPO/THPO up to five extra calendar days to consider the comment, because it goes beyond the notice requirements of current law.[114] PCIA also disagrees with the 60-day resubmission period proposed in Section VII.A.4.[115] It is in the Applicant's best interest to provide all materials to the SHPO/THPO as soon as possible in order to expedite review. A specific re-submission period as a result of a SHPO/THPO's Submission Packet adequacy determination is unnecessary. The

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[111] *Id.* at Section VI.E.4., A-20.

[112] *Id.* at Section VII.A.1., A-20.

[113] *Id.* at Section VII.A.1., A-20 Note 14.

[114] *Id.* at Section VII.A.3., A-20.

[115] *Id.* at Section VII.A.4., A-20 Note 15.

Commission should revise this section to simply allow re-submittal or supplemental submittals whenever desired or needed.

Except as noted above, and in the redlined comments to the Draft NPA in Attachment A, PCIA agrees with procedural framework proposed in Section VII.C.2. but believes that a default approval of a "no adverse effect" finding should apply if the Commission fails to respond within fifteen days.[116] Such a proposal will significantly streamline the process. PCIA also believes the SHPO/THPO "must" (rather than "should") provide an explanation when it disagrees with an applicant's no effect or no adverse effect finding, and Sections VII.B.3. and VII.C.3. in the final NPA should be revised accordingly. Such an explanation is necessary to safeguard Applicants against arbitrary decision making.

PCIA also supports Section VII.C.5., which expressly encourages SHPOs to seek measures to change an "adverse effect" to a "conditional no adverse effect."[117] PCIA, however, urges the Commission to revise Section VII.C.6. to expressly permit the Commission to make its own determination of "conditional no adverse effect" when a SHPO and Applicant cannot agree.[118]

Sections VII.D.1-5 should contain time limits for resolving adverse effects disputes between Applicants and consulting parties.[119] For instance, if the parties are unable to resolve the disagreement and enter a MOA within three months, the dispute should be forwarded to the Commission for resolution. The final NPA should explicitly recognize the Commission's power to design a mitigation plan through a MOA or

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[116] *Id.* at Section VII.C.2., A-22.

[117] *Id.* at Section VII.C.5., 6, A-22, 23.

[118] *Id.* at Section VII.C.6., A-23.

[119] *Id.* at Section VII.D.1 – 5., A-23 Note 18.

otherwise. Finally, Section VII.D.5. should be revised to read the "terms of the MOA" not "mitigation measures."[120]

7. Sections VIII and IX

The meaning of Section VIII is unclear; if emergency authorizations are excluded from the historic preservation review process, the agreement should say so explicitly.[121] PCIA urges the Commission to exempt all temporary authorizations, including emergency authorizations.

The procedures concerning undiscovered historic sites set out in Section IX.A. should be limited to pre-completion of construction.[122] After Section 106 review is completed, no further review is provided or should be permitted post-construction.

PCIA urges the Commission to further refine the definition of "implementation of an Undertaking" in Section IX.D.[123] In its current context, it is unclear whether the phrase "implementation of an Undertaking" means before completion of construction; or, during the beginning phases of construction.

8. Sections X, XI, XIII and XV

PCIA agrees with the statement in Section X that Section 110(k) of the NHPA requires a showing of intent to avoid Section 106 requirements and intentionally adversely affecting a historic property.[124] PCIA agrees with the statement in Section

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[120] *Id.* at Section VII.D.5., A-23.

[121] *Id.* at Section VIII., A-23.

[122] *Id.* at Section IX.A., A-24.

[123] *Id.* at Section IX.D., A-24.

[124] *Id.* at Section X.D., A-25.

X.D. that violations of Section 110(k) should be resolvable with an MOA.[125] PCIA also agrees with the statement in Section X.G. that Undertakings excluded from review under NCPA or the NPA are not subject to Section 110(k) review.[126] PCIA believes Section XI should make clear that complaints regarding constructed towers must comply with Section X.[127] PCIA believes that Section XIII must clarify that should consultation over termination fail to produce a resolution, the agreement shall be terminated 60 days after notice of termination is served by a signatory upon all other parties and published in the Federal Register. Finally, PCIA supports the statement in Section XV that neither signatories nor entities complying with this agreement waive the right to sue to overturn, or to otherwise assert the invalidity of any provision of the NHPA, or the ACHP's Section 106 rules.[128]

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[125] *Id.* at Section X.D., A-26.

[126] *Id.* at Section X.G., A-26.

[127] *Id.* at Section X.I., A-26.

[128] *Id.* at Section X.V., A-27.

Conclusion

For the reasons stated above, PCIA urges the Commission to adopt the proposals discussed herein, including the revisions to the Draft NPA proposed in Attachment A and the revisions to Forms NT and CO in Attachments B and C.

/s/

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Attachment A – Revised Draft NPA

Attachment B – Revised Form NT

Attachment C – Revised Form CO